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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/565,346	01/20/2006	Jane Hirsh	CPX-015.01	1923
25181	7590	01/11/2010		
FOLEY HOAG, LLP PATENT GROUP, WORLD TRADE CENTER WEST 155 SEAPORT BLVD BOSTON, MA 02110			EXAMINER HAGHIGHATIAN, MINA	
			ART UNIT	PAPER NUMBER
			1616	
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			01/11/2010	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/565,346

Applicant(s)

HIRSH ET AL.

Examiner

Mina Haghighatian

Art Unit

1616

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 22 December 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 5 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.
NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5. ☒ Applicant's reply has overcome the following rejection(s): The amendments overcome rejection of claims under 112, 1st paragraph.

6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____.

Claim(s) objected to: _____.

Claim(s) rejected: 1, 3-13.

Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☐ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.

12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____

13. ☐ Other: _____.

/Mina Haghighatian/
Primary Examiner, Art Unit 1616

Continuation of 11. does NOT place the application in condition for allowance because:

Applicants arguments are not persuasive and do not overcome the rejections of claims under 103. Applicants state that "assuming arguendo that all of the limitations of a rejected claim are taught or suggested in the references relied upon by the Examiner, or that any missing limitations are among the variations that would have been "obvious to try," the Applicants respectfully assert that there was no reasonable expectation of success in using hydrofluorocarbon propellants for immediate foaming compositions. Sachetto describes aqueous foamable compositions comprising active agents, surfactants and foaming agents. The foaming agents described are liquefied gases, such as propane, butane, isobutene, as well as HFA 134a and HFA 227 (page 4, and table 1). However, the only exemplification provided is for compositions comprising butane as the foaming agent; no compositions comprising HFAs are exemplified, and Sachetto provides no teaching as to why butane and HFAs would reasonably be considered interchangeable".

This is not found persuasive because Tamarkin clearly teaches foam formulations comprising all the required elements, except for HFAs. Tamarkin also discloses that when the foamable carrier is admixed with a propellant substance in an amount of about 5-25% in an aerosol container, a lightweight breakable foam is produced for topical applications on skin (see [0056]). Sachetto also clearly states that "suitable foaming agents include propane, butane and isobutane". It also recites that "more recently developed environmentally friendly propellants such as HFA 134a and HFA 227 are suitable for use as foaming agents in the PRESENT invention" (see page 4, lines 16-33). While Sachetto does not use the term interchangeable, one of ordinary skill in the art would be more than capable of deducing that Sachetto is considering any of the above recited propellants suitable for his foam formulations. This is interpreted as the recited propellants being interchangeable in his foam formulations.

As with the evidence provided, while they do recite that the HFAs may not be an exact substitute for the CFCs, the differences are disclosed and well known to one of ordinary skill in the art. That means that one of ordinary skill in the art is more than capable of adjusting the formulation accordingly. Since HFAs are generally considered a good (or the best) substitute for CFCs, it is considered normal practice to use HFAs in formulations and add or delete co-solvents or surfactants to provide for a stable and desired formulation. For example in Exhibit E, Vervaeke et al, it is disclosed that "Conventional (CFC soluble) surfactants are effectively insoluble in the major CFC replacement candidates, HFA 134 and HFA 227ea, in the absence of co-solvents. While these ethane and propane derivatives have comparable boiling points and vapor pressures to dichlorodifluoromethane (CFC 12), their increased polarity demands that formulators use either alternative (soluble) surfactants, or co-solvents along with traditional surfactants, in order to stabilize pressurized suspension products" (see Abstract, lines 2-6).